



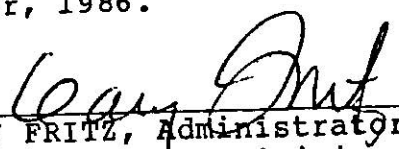


one acre located in the NE $\frac{1}{4}$  of Section 31, Township 6 South, Range 4 East, Gallatin County, Montana. An additional 5 gpm up to .014 acre-feet per year may be appropriated for stockwatering purposes, for a total diversion of 25 gpm up to .021 acre-feet per year. The period of appropriation for irrigation and stockwater purposes shall be June 15, to September 1, inclusive of each year. The point of diversion for the uses is the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 31, Township 6 South, Range 4 East, Gallatin County, Montana. The means of diversion for the flood irrigation is by pump, while the stockwatering is an instream use. The priority date for this Permit shall be 4:00 p.m., January 26, 1979.

A. This Permit is subject to all prior and existing rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

DATED this 31 day of December, 1986.

By

  
GARY FRITZ, Administrator  
Water Resources Division  
Department of Natural Resources  
and Conservation  
1520 East Sixth Avenue  
Helena, MT 59620

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.



MEMORANDUM

An Oral Argument Hearing was held before the Administrator of the Water Resources Division on Tuesday, December 3, 1985, at 3:30 p.m. At the hearing Mr. Erwin presented his arguments taking exception to the Proposal for Decision entered October 10, 1985, which proposed to modify Mr. Erwin's Beneficial Water Use Permit. A brief summary of the facts in this case will provide background for understanding Mr. Erwin's exception.

Beneficial Water Use Permit No. 21673-s41H was issued to Bill Erwin on July 2, 1979, with a priority date of January 26, 1979, at 4:00 p.m. This Provisional Permit granted Mr. Erwin 20 gallons per minute and 3.96 acre-feet per year for new flood irrigation on approximately two acres and five gpm and .014 acre-feet per year for stock watering. On July 10, 1981, the DNRC received a Notice of Completion of Water Development from Mr. Erwin, attesting that the diversion and distribution works had been completed and water had been put to beneficial use as specified within the Permit.

On June 20, 1984, Scott Compton from the DNRC field office visited the Erwin property to verify compliance with the terms of the Permit. In his field report, Mr. Compton confirmed the stock use portion of the Permit but estimated that actual irrigation use was limited to an area of .25 acres with a volume of .25 acre-feet. Based on this report, the DNRC on July 8, 1985, issued Mr. Erwin an Order to Show Cause why the Permit



should not be modified to reflect the findings of the field report. The show-cause hearing was held in Helena on August 19, 1985.

At the August 19 hearing, the DNRC offered evidence that included Scott Compton's testimony in support of the proposed Permit modification to .25 acres and .25 acre-feet. In response, Mr. Erwin testified that he had actually irrigated one acre, but had only pumped water for two hours before filing his Notice of Completion on July 10, 1981. The Hearing Examiner found that Mr. Erwin's testimony had more probative value than the DNRC field report, since Scott Compton did not see the irrigation taking place, but could only estimate what had occurred. Proposal for Decision, p. 16. Accordingly, the Hearing Examiner modified the Permit to reflect Mr. Erwin's testimony, changing the acres irrigated from two to one, and changing the acre-feet from 3.96 to .0073. The Examiner's calculation of .0073 acre-feet is explained in Conclusion of Law 13, which states in its entirety:

13. As discussed in Conclusion of Law 11, above, the appropriate right must be limited to the amount of water which has been applied to beneficial use: such rights are not granted for development that has not occurred and may never occur. See Final Order, in re City of Bozeman (January 9, 1985). To hold otherwise would allow a proliferation of "paper rights" which could forestall legitimate water developments by future appropriators.

On the basis of the Permittee's testimony as to the limited amount of irrigation which actually occurred, it is proper to modify the Permit to reflect the amount which actually was perfected, rather than the amount proposed by the Department on the basis of Field Office estimates.



The most irrigation that the Permittee had done prior to filing a Notice of Completion was two hours of flood irrigation on one afternoon. (See Finding of Fact 7.) Two hours of pumping at the Permit flow rate of 20 gpm yields a total diversion of 2,400 gallons, or slightly more than .0073 acre-foot. This amount is substantially less than the .25 acre-foot amount which the Department suggested that the Permit be modified to show.

The Permittee actually diverted approximately 18,000 gallons of water during his two hours of irrigation. (Mr. Beck's review of the pump set-up suggests that it pumps about 150 gpm.  $150 \text{ gpm} \times 120 \text{ minutes} = 18,000$  gallons. See Finding of Fact 8). However, pumping at a much greater rate than the flow rate imposed in the Permit does not fall within the parameters of being in "substantial accordance" with permit terms. See MCA § 85-2-315(1). No water use permit can be perfected outside of the permit terms: the volume of water which was diverted as the result of exceeding the Permit flow rate is not part of the perfected water use right. (Proposal at pp. 16-17).

Mr. Erwin takes exception to the third paragraph of Conclusion 13. He requests in his exception letter that the Administrator modify the Permit to reflect the DNRC field report estimate of .25 acre-feet. As Mr. Erwin states in his letter.

When I requested a hearing on the modification of water right 21673-s41H, I was not told that my water right could be further reduced from the amount recommended by Scott Compton. I asked for a hearing on the basis that if I presented a reasonable argument on my behalf I could possibly be granted a higher amount. I certainly would not have pursued the matter if I had been told that further reduction was a possibility.

In short, Mr. Erwin argues that the DNRC Hearing Examiner and the agency Administrator should be bound by the DNRC's initial recommendation in the Order to Show Cause, which recited the field report's .25 acre and .25 acre-foot estimate of actual irrigation use. This argument reflects Mr. Erwin's quite



understandable question as to how the agency apparently can "change its mind" in mid-proceeding and adopt a different modification than was initially recommended. The explanation lies in the fact that the modification hearing is a trial-type proceeding, where all evidence of actual use must be considered.

In an administrative contested case proceeding such as the modification hearing in this case, the Hearing Examiner acts as an impartial factfinder and decisionmaker, much like a district court judge. The administrative rules concerning DNRC hearing procedures make it clear that the Examiner's function is to take testimony from all parties, and then make a decision based only upon the factual evidence in the record. See ARM 36.12.223, 228. Thus, not only is the Hearings Examiner not bound by the testimony offered by the DNRC, but she is bound to critically weigh the probative value of that testimony. It was, therefore, not improper for the Examiner, based upon her evaluation of the evidence, to adopt a modification different from that initially recommended by the DNRC.

In weighing the evidence in this case, the Hearing Examiner found Mr. Erwin's own testimony to be the best evidence of his actual irrigation use. Proposal at p. 16. The judgment of the probative value of evidence and the resultant findings of fact are matters in which a Hearing Examiner's opinion is given great weight, and the Administrator has limited power to overturn such findings. Section 2-4-621(3), MCA, provides in pertinent part:

The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the



agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. (Emphasis added).

It cannot be said that there was no substantial evidence supporting the Examiner's decision, nor is there any indication that the proceedings below were flawed in some essential way. Consequently, the Administrator is bound to adopt the Permit modification as proposed by the Hearing Examiner.

It is important to remember that, in water law, a water right is acquired only to the extent that water is actually put to beneficial use. This legal principle is inherent in the DNRC's water permit system, and it forms the legal basis for the Hearing Examiner's modification of the Permit terms to reflect actual water use. This proceeding might have been avoided if, during the period provided in the Permit for completion and perfection of the right, Mr. Erwin had been in a position to use the water according to the flow rate and volume contemplated in his Application. Mr. Erwin will need to apply for a new permit for the water he needs when he is ready to actually put his complete irrigation system in place.



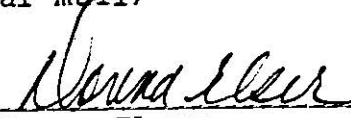
CERTIFICATE OF SERVICE  
MAILING

I, Donna Elser, employee of the Department of Natural Resources and Conservation, hereby certify that on Wednesday, December 31, 1986, a true and correct copy of the FINAL ORDER In the Matter of the Application for Beneficial Water Use Permit No. 21673-s41H by Bill Erwin was duly served upon all parties of record, as listed below by depositing the same, first class postage prepaid, in the United States Mail.

Bill Erwin  
138 Elmwood Lane  
Helena, MT 59601

Faye B. McKnight  
Department of Natural Resources  
and Conservation  
1520 E. 6th Ave.  
Helena, MT 59620  
(hand deliver)

Scott Compton  
Water Rights Bureau Field Manager  
1201 E. Main  
Bozeman, MT 59715  
(inter-departmental mail)

  
Donna Elser

CASE # 21673



Modification to reflect actual use (based on field report and Permittee evidence), but Permit terms impose the ~~extent~~ limits of the right which may be affected; no perfection occurs ~~under~~ <sup>outside of</sup> the Permit terms

BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF BENEFICIAL )  
WATER USE PERMIT NO. 21673-s41H ) PROPOSAL FOR DECISION

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held on August 19, 1985, in Helena, Montana.

Bill Erwin, holder of the above-specified Beneficial Water Use Permit, appeared personally at the hearing.

The Department of Natural Resources and Conservation (hereafter, the "Department") was represented by legal counsel Faye B. McKnight.

Scott Compton, Field Manager of the Bozeman Water Rights Bureau Field Office, appeared as witness for the Department.

STATEMENT OF THE CASE

On January 26, 1979, Bill Erwin filed an Application for Beneficial Water Use Permit, seeking to appropriate 20 gallons per minute ("gpm") up to 3.96 acre-feet of water per year for new flood irrigation of 2 acres. The Application additionally sought 5 gpm up to .014 acre-feet of water per year for stockwater, for a total proposed appropriation of 25 gpm up to 3.974 acre-feet per year, for irrigation and stockwater uses from June 15 to September 1, inclusive, of each year.

CASE # 21673



The Application stated the point of diversion to be the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 31, Township 6 South, Range 4 East, Gallatin County, Montana, from surface water of the West Fork, West Gallatin River. The proposed place of use was listed as the NE $\frac{1}{4}$  of Section 31 for flood irrigation, and the SW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 31 for stock watering, all in Township 6 South, Range 4 East, Gallatin County, Montana. Means of diversion was listed as electric pump, "pump into trenches to irrigate." (Application, Item 7.)

The pertinent portions of the Application were published in the Bozeman Daily Chronicle, a newspaper of general circulation in the area of the source, on April 18 and 25, and May 2, 1979.

One timely objection was filed to the Application. The Montana Power Company filed an objection to the Application, stating that the proposed appropriation was upstream from certain specified dams and reservoir impoundments, and alleging generally that there was insufficient water and that therefore the proposed use would affect the downstream water rights of Montana Power and other senior appropriators. (May 1, 1979 Objection and cover memorandum filed by Montana Power Company.)

The Department responded to the Objection on June 8, 1979, stating that the Department did not feel Montana Power Co.'s prior right would be affected, as the proposed project was over 90 miles from MPC's point of diversion. The Department proposed issuing the Permit subject to all prior existing water rights, and to final determination of existing water rights as provided by Montana law.



Montana Power Co. responded in a letter dated June 18, 1979, stating that it acquiesced to granting of a provisional permit under the stated conditions, but that such acquiescence should not be understood as "an acknowledgment that the prior existing water rights of the Company are being adequately protected by provisional permits." (June 18, 1979 letter, signed by James F. Walsh.)

On July 2, 1979, a Provisional Permit was issued to Bill Erwin, granting him the uses, flow rates, volumes, point of diversion, and places of use as applied for, with a priority date of January 26, 1979 at 4:00 p.m. The Provisional Permit stated in relevant part:

The diversion and distribution works for this appropriation shall be completed, and water shall be applied to beneficial use as specified above, on or before August 1, 1981, or within any authorized extension of time. The Notice of Completion of Surface Water Development, Form No. 617, shall be filed on or before October 1, 1981.

On July 10, 1981, the Department received a notarized Notice of Completion of Water Development, signed by Bill Erwin and dated July 9, 1981, attesting that the water development had been completed and water put to beneficial use. In that portion of the Notice of Completion where the Permit holder is asked to give details of the appropriation as actually developed, if the development "was not fully developed as specified within the terms, conditions, orders, and limitations of Permit No. 21673-s41H", Mr. Erwin did not write any response.



Scott Compton telephoned Bill Erwin on June 15, 1984, in regard to verifying the appropriation, and made a site visit to Mr. Erwin's property on June 20, 1984.<sup>1</sup> The Field Report prepared by Scott Compton states, in part:

Water has been used to try and grow trees on the property by means of pumping water from the creek, with a small portable pump ...the approximately 3 acres owned by Mr. Erwin is fenced and there is stock use of the stream as it flows through. While the flow rate of 20 gpm could not be verified it seems reasonable for irrigating this small acreage of trees. I have estimated the minimum area irrigated at .25 acres and a volume of .25 AF.

Mr. Compton sent Bill Erwin a copy of the verification on July 2, 1984, with a cover letter asking Mr. Erwin to review the verification form, specify any items where Mr. Erwin disagreed with the findings, and to indicate whether or not a hearing was requested on the items of disagreement.

Mr. Erwin returned the verification form (dated July 17, 1984), stating that he disagreed with the specification of the water source (Item 4), with the recommended volume amount (Item 12), and with the irrigated acreage figure (Item 9). Mr. Erwin

<sup>1</sup> The Field Report states that the site visit took place on June 22, 1984. This apparently is a typographic error, since the Field Report is dated June 21, 1984, and since the Permit Verification Data sheet was filled out on June 20, 1984.



stated that the "acreage capable of being irrigated is 2 acres more or less and not .25 acres", and that "at least 1.5 AF would be required to irrigate 2 acres of pasture land and trees and not .25 AF." Mr. Erwin requested that a hearing be held on the items of disagreement.

#### EXHIBITS

The Department of Resources and Conservation made a motion that the contested case file be made part of the record in this matter. Permittee Bill Erwin reviewed the file and stated that he had no objection; therefore, the contested case file was accepted into the record without objection.

The Department offered three exhibits for admission into the record.

Department Exhibit 1 is a photocopy of the portion of the USGS map which shows the Permittee's property. The map is marked with Permittee's point of diversion and place of use, and is marked as to where the North Fork and South Fork of the West Fork of the Gallatin River enter the West Fork of that River.

Department Exhibit 2 is a sheet bearing three photos of the Erwin property at the time of the June 20, 1984 site visit by Scott Compton. (Photos taken by Mr. Compton).

Department Exhibit 3 is a sheet bearing three photos of the Erwin property at the time of the June 20, 1984 site visit by Scott Compton. (Photos taken by Mr. Compton).

Department Exhibits 1, 2, and 3 were accepted into the record without objection.



The Permittee offered two exhibits for admission into the record.

Permittee Exhibit A (marked as Applicant's A) consists of eleven photographs. Four small photos show various parts of the Erwin property during the winter. Two slightly larger photos show bench land/creek bottom/fence line and what Mr. Erwin has designated as the "south parcel". The remaining five photos show the pump which Mr. Erwin testified he uses to irrigate the property, and shows discharge from the 2" line onto grassland. The photos each bear a brief notation on the back, written by Mr. Erwin. Mr. Erwin testified that the photographs were taken in August, 1983, or possibly in August, 1982.

Permittee Exhibit B (marked as Applicant's B) consists of photocopies of two plat maps which show the Erwin property. Immediately subsequent to the hearing, Mr. Erwin asked to have his plat maps returned. Therefore, photocopies of the plat maps were made, and were marked for identification in the presence of counsel for the Department.

Permittee Exhibits A and B were accepted into the record without objection. However, Permittee Exhibit B hereby is found to be relevant only for the purpose of corroborating the irrigation practices to which Mr. Erwin testified, and to show the general layout of the place of use. Since the photographs were taken one to two years after Mr. Erwin filed his Notice of Completion, they have no probative value as to the condition of the property, or the specific irrigation which occurred, prior to the filing of the Notice of Completion.



This reasoning holds true in regard to the Department's objection to Permittee's testimony about post-Notice of Completion irrigation as well, and the objection hereby is overruled. The testimony is accepted for the limited purpose of corroborating Mr. Erwin's pattern of use, but is not accepted as a basis for enlarging whatever right was perfected at the time the Notice of Completion was filed.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

#### PROPOSED FINDINGS OF FACT

1. Beneficial Water Use Permit No. 21673-s41H was issued to Bill Erwin on July 2, 1979, with a priority date of January 26, 1979 at 4:00 p.m. This Provisional Permit grants Mr. Erwin 20 gallons per minute up to 3.96 acre-feet per year for new flood irrigation, and 5 gpm up to .014 acre-feet per year for stock watering, for a total appropriation right of 25 gpm up to 3.974 acre-feet per year.

The source and point of diversion for the Permit specified as the West Fork Gallatin River at a point in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 31, Township 6 South, Range 4 East, Gallatin County, Montana. The place of use for irrigation is specified as 2 acres, more or less, in the NE $\frac{1}{4}$  of Section 31, Township 6 South,



Range 4 East, Gallatin County, Montana. The period of appropriation for the Permit is June 15 to September 1, inclusive of each year.

The Permit specifies that the diversion and distribution works for the appropriation must be completed, and water must be applied to beneficial use as specified in the Permit, on or before August 1, 1981, or within any authorized extension of time. The Permit further specifies that the Notice of Completion of Surface Water Development must be filed on or before October 1, 1981.

2. Bill Erwin did not file an Application for Extension of Time in which to perfect his Permit to Appropriate Water.

3. On July 10, 1981, the Department of Natural Resources and Conservation received a Notice of Completion of Water Development signed by Bill Erwin, attesting that the diversion and distribution works had been completed and water had been put to beneficial use.

The Notice of Completion did not contain any notation by Mr. Erwin in response to the Notice's request that details be given if the development was not fully developed as specified within the terms, conditions, orders, and limitations of Permit No. 21673-s41H.

4. Scott Compton, Field Manager of the Bozeman Water Rights Bureau Field Office, contacted Mr. Erwin by telephone on June 15, 1984, to discuss Mr. Erwin's appropriation pursuant to the Permit. Mr. Compton testified that Bill Erwin stated in the



phone conversation that he was using the stockwater portion of the Permit, but was not using the entire irrigation portion, and that he had irrigated small trees on the property by means of pumping water from the creek with a small portable pump. (See also Field Report to File No. P21673-s41H, dated June 21 (sic), 1984.)

5. Mr. Erwin testified at the hearing that he does not recall telling Scott Compton that less than the entire irrigation portion of the Permit was being put to use.

6. Scott Compton made a visit to Mr. Erwin's property on June 20, 1984, for purposes of verifying whether Mr. Erwin was appropriating water in compliance with Beneficial Water Use Permit No. 21673-s41H.

The site visit verified the stock use portion of the Permit: Mr. Erwin's property was fenced and there was stock use of the stream on the property. However, Mr. Compton was unable to verify the irrigation use in its entirety. He testified that it was possible that the small trees had been irrigated, but that there was no evidence that any other irrigation had occurred.

Mr. Compton stated in his field report that the irrigation flow rate could not be verified, but that 20 gpm seemed reasonable for irrigating the trees. He stated further that no pump information was available to him, but that a lift up to 30 feet would be necessary to irrigate some areas of Mr. Erwin's property. (Field Report.)



On the basis of his site visit, Scott Compton recommended that the irrigation portion of the Permit be modified downward for volume and place of use to .25 acre-feet to irrigate .25 acres. Mr. Compton testified that his estimate of .25 acres of use for the trees was generous, and that probably less acreage than the .25 acre amount actually had been irrigated.

7. Mr. Erwin filed his Notice of Completion of Water Development on July 10, 1981. Prior to this time, he had irrigated the property only once, on July 4, 1981. (Testimony of Bill Erwin.) Mr. Erwin stated that he pumped for the duration of about two hours on that one afternoon, flood irrigating about one acre and hand-carrying water to some small trees that he had planted near the highway.

Mr. Erwin testified that he doesn't know how much water he pumped, but that he knew he had to do something there, because he wanted to prove up the water right. In response to questioning, Mr. Erwin stated that he was using a two-inch discharge hose, and a portable pump which is probably a 5 h.p. Briggs and Stratton. In response to further questioning, Mr. Erwin stated that he would not mind if the Hearing Examiner asked a Department technical expert for the approximate pump capacity of Mr. Erwin's portable pump.

8. Jim Beck, Agricultural Specialist for the Helena Water Rights Bureau Field Office, reviewed the photographs introduced by the Permittee (Permittee Exhibit A), and stated that he believes the pump set-up as shown would discharge in the neighborhood of 150 gpm. (August 21, 1985.)



9. Mr. Erwin testified that he did not agree with the permit verification because he feels the Department has said that only .25 acres are worthy of being irrigated, and he disagrees with this evaluation.

Mr. Erwin stated that he has about 1½ acres of property on one side of the creek, and 1½ acres on the other, with about an acre of the total down next to the creek where it is not practical to irrigate, because it subirrigates anyway. Mr. Erwin stated that he wants water on the benchland portion of his property, and feels that 1.5 acre-feet is necessary to irrigate the two acres capable of being irrigated.

Mr. Erwin testified that it was not practical to put in trenches for flood irrigation, as he had proposed to do at the time of the Application in this matter (See Application, section 7), due to the topography of the property. Instead he uses his portable pump, runs the discharge hose out onto the benchland, and lets the water flood the field. (See Permittee Exhibit A.)

10. Mr. Erwin testified that irrigating the benchland ensures that there will be enough grass for his horses to graze in the fall. He testified that he has pumped in August of every year for this purpose. He stated that it is difficult for him to get down to the property to irrigate, since he lives in Helena.

11. Mr. Erwin disagreed with the Field Office's characterization of the source as the West Fork of the Gallatin River. He wrote on the Permit Verification Form, and testified at the hearing, that he believes the source is correctly named the North Fork of the West Fork of the Gallatin River.



12. Scott Compton testified that it is his understanding that the area of the river where Mr. Erwin is located is referred to locally as the "North Fork of the West Fork" of the Gallatin River, but that it actually is the mainstem of the West Fork.

The South Fork of the West Fork enters the Gallatin just downstream from the Erwin property, which may lead to the confusion, but USGS maps of the area show that the North Fork of the West Fork joins the West Fork in Section 35, Township 6 North, Range 3 East, over two miles upstream from Mr. Erwin's point of diversion. The map marked for identification as Department Exhibit 1 indicates that the Erwin property is located on the mainstem of the West Fork, and not on the North Fork of the West Fork.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

#### PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

3. MCA § 85-2-314 states:



If the work on an appropriation is not commenced, prosecuted, or completed within the time stated in the permit or an extension thereof or if the water is not being applied to the beneficial use contemplated in the permit or if the permit is otherwise not being followed, the department may, after notice, require the permittee to show cause why the permit should not be modified or revoked. If the permittee fails to show sufficient cause, the department may modify or revoke the permit.

4. Pursuant to MCA § 85-2-315, Scott Compton of the Department's Bozeman Field Office did a field verification investigation of Mr. Erwin's appropriation after Mr. Erwin filed a Notice of Completion for Permit No. 21673-s41H.

As the result of Mr. Compton's findings, the Department recommended that the volume and acreage be modified on Mr. Erwin's appropriation. Mr. Erwin requested a hearing. Therefore, pursuant to MCA § 85-2-314, the Department required Mr. Erwin to show cause why his permit should not be modified.

5. The Department has the burden of production (going forward) in this matter. Therefore, it must produce evidence to show a question exists as to whether the Permit was perfected within the terms in which it was issued, and that the evidence is such that reasonable minds might differ as to whether sufficient grounds exist for a modification of the Permit in this matter. See In the Matter of Beneficial Water Use Permit Nos. 31587-g41F and 33294-g41F, Proposal for Decision, March 4, 1985; 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.9 (2d ed. 1980).



6. The Permittee has the burden of persuasion in this case; i.e., the burden of proving that it is more likely than not that insufficient grounds exist for modification of the Permit in this matter. See In the Matter of Beneficial Water Use Permit Nos. 31587-g41F and 33294-g41F, Proposal for Decision, March 4, 1985; 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.9 (2d ed. 1980).

7. The Department met its burden by producing evidence that the Permittee has not irrigated the acreage for which he had applied, nor has he constructed the trenches that were listed on the Application as the proposed method of irrigation. (Field Report, Verification Data Sheet, Department Exhibits 2 and 3, testimony of Scott Compton).

8. The Permittee failed to show sufficient cause why the Permit in this matter should not be modified. He testified that, in fact, only one acre of land had been irrigated out of the proposed two acres (See Provisional Permit), and that the proposed trenches had never been constructed. He also testified that the water had only been used once, for a period of approximately two hours, prior to the date on which he filed his Notice of Completion.

9. Mr. Erwin testified that he had not trenched the property because the topography made it impractical to construct the trenches he originally had planned. (See Finding of Fact 9.) Although the method of irrigation which Mr. Erwin proposed at the time of his Application was not installed, the Permit was issued with the general term "new flood irrigation". Since Mr. Erwin is flood irrigating, albeit not by trench, there is no basis for modification of this Permit term.



10. Mr. Erwin's use of water, for irrigation, is a beneficial use. MCA § 85-2-102(2). Although Scott Compton testified that there was no evidence of irrigation, with the possible exception of the small trees (see Finding of Fact 6), Mr. Erwin testified that the water was used to irrigate the grasses, ensuring pasturing for his horses in the fall. In addition, the water has been used to irrigate the trees.

11. Although Mr. Erwin believes that two acres of his land are capable of being irrigated, the facts in this matter indicate that only one acre of the property actually has been irrigated. Since the application of water to actual beneficial use sets the parameters of the water right, the Permit in this matter must be modified to reflect use only on the one acre actually irrigated.

Contrary to Mr. Erwin's stated belief that the Department, in recommending modification, has made a value judgement that only .25 acres are worthy of irrigation (See Finding of Fact 9), the Department has based its modification recommendation on the extent of irrigation which had taken place at the time the Notice of Completion was filed. (See Finding of Fact 3, 4, 6.)

The Hearing Examiner notes that the "deadline" for completion (the date by which the Permit right will be perfected) is self-imposed by the Permittee, and that the Permittee in this matter did not file any request for extension or otherwise indicate that it would take a longer period of time to fully develop the proposed irrigation. By filing a Notice of Completion which attested that his water appropriation was completed, Mr. Erwin documented that his proposed appropriation was fully developed.



The Permit in this matter therefore must be modified to reflect actual use. The Permittee is not entitled to "sit on" a water right and maintain the priority date for that part of the use which has not, and possibly may never be, developed.

12. The evidence at the hearing in this matter indicates that the acreage should be modified on Mr. Erwin's Permit. The Department's proposed modification is to reduce the acreage from the two acres applied for originally to .25 acres, on the basis of Scott Compton's field investigation.

However, the evidence at the hearing indicates that Mr. Erwin has irrigated one acre. (Testimony of Mr. Erwin, Permittee Exhibit B). This evidence has more probative value than Mr. Compton's estimate, since Mr. Compton did not see the irrigation taking place, and his estimate was based on hypothesis about what had occurred.

13. As discussed in Conclusion of Law 11, above, the appropriate right must be limited to the amount of water which has been applied to beneficial use: such rights are not granted for development that has not occurred and may never occur. See Final Order, in re City of Bozeman (January 9, 1985). To hold otherwise would allow a proliferation of "paper rights" which could forestall legitimate water developments by future appropriators.

On the basis of the Permittee's testimony as to the limited amount of irrigation which actually occurred, it is proper to modify the Permit to reflect the amount which actually was perfected, rather than the amount proposed by the Department on the basis of Field Office estimates.



The most irrigation that the Permittee had done prior to filing a Notice of Completion was two hours of flood irrigation on one afternoon. (See Finding of Fact 7.) Two hours of pumping at the Permit flow rate of 20 gpm yields a total diversion of 2,400 gallons, or slightly more than .0073 acre-foot. This amount is substantially less than the .25 acre-foot amount which the Department suggested that the Permit be modified to show.

The Permittee actually diverted approximately 18,000 gallons of water during his two hours of irrigation. (Mr. Beck's review of the pump set-up suggests that it pumps about 150 gpm.  $150 \text{ gpm} \times 120 \text{ minutes} = 18,000 \text{ gallons}$ . See Finding of Fact 8.)

However, pumping at a much greater rate than the flow rate imposed in the Permit does not fall within the parameters of being in "substantial accordance" with permit terms. See MCA § 85-2-315(1). No water use permit can be perfected outside of the permit terms: the volume of water which was diverted as the result of exceeding the Permit flow rate is not part of the perfected water use right.

14. The Permittee is not entitled to continue his current irrigation method unless he can reduce the flow rate which his pump system is pulling down to 20 gpm. Evidence indicates that, more likely than not, Mr. Erwin's pump set-up diverts at a flow rate which is 7 to 8 times the flow rate for which he applied, and for which the Permit was granted. (See Findings of Fact 1, 8.)



If the Permittee wishes to use his present pump system, he must apply for a new appropriation right. (See MCA § 85-2-311, effective July 1, 1985). Although the terms of the Permit may be modified, the Department does not have the authority to issue a permit for a higher flow rate or greater volume than the Application requested and the Permit granted. (See MCA § 85-2-312(1), effective July 1, 1985.)

15. If the Permittee wishes to irrigate more acreage, or irrigate more often or for greater lengths of time, than he had irrigated prior to filing his 1981 Notice of Completion, he is entitled to apply for a Beneficial Water Use Permit to cover the additional use.

16. The source for this Permit is correctly identified as the West Fork of the Gallatin River. (See Finding of Fact 12.)

WHEREFORE, based upon the proposed Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

#### PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Beneficial Water Use Permit No. 21673-s41H hereby is modified to allow Bill Erwin to appropriate 20 gpm up to .0073 acre-feet per year for flood irrigation of one acre located in the NE¼ of Section 31, Township 6 South, Range 4 East, Gallatin County, Montana. An additional 5 gpm up to .014 acre-feet per year may be appropriated for stockwatering



purposes, for a total diversion of 25 gpm up to .021 acre-feet per year. The period of appropriation for irrigation and stockwater purposes shall be June 15 to September 1, inclusive, of each year. The point of diversion for the uses is the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 31, Township 6 South, Range 4 East, Gallatin County, Montana. The means of diversion for the flood irrigation is by pump, while the stockwatering is an instream use. The priority date for this Permit shall be 4:00 p.m., January 26, 1979.

A. This Permit is subject to all prior and existing rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

DONE this 10<sup>th</sup> day of June, 1985.

Peggy A. Elting  
Peggy A. Elting, Hearing Examiner  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59620  
(406) 444 - 6612

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed permit, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file



exceptions thereto with the Hearing Examiner (32 S. Ewing, Helena, MT 59620); the exceptions must be filed within 20 days after the proposal is served upon the party. M.C.A. § 2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed. Any adversely affected party has the right to present briefs and oral arguments before the Water Resources Administrator, but these requests must be made in writing within 20 days after service of the proposal upon the party. M.C.A. § 2-4-621(1). Oral arguments held pursuant to such a request will be scheduled for the locale where the contested case hearing in this matter was held, unless the party asking for oral argument requests a different location at the time the exception is filed.



CERTIFICATE OF SERVICE

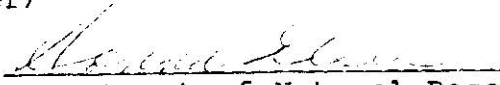
I, Donna Elser, Department of Natural Resources and Conservation, hereby certify that on the 10th day of October, 1985, a true and accurate copy of the PROPOSAL FOR DECISION on the Application for Beneficial Water Use Permit No. 21673-s41H by BILL ERWIN was duly served upon all parties of record, as listed below by depositing the same, postage prepaid, in the United States Mail.

Bill Erwin  
138 Elmwood Lane  
Helena, MT 59601

Scott Compton, AOS  
Department of Natural Resources  
and Conservation  
1201 E. Main  
Bozeman, MT 59715  
(inter-departmental mail)

Faye B. McKnight, Legal Counsel  
Department of Natural Resources  
and Conservation  
32 South Ewing  
Helena, MT 59620  
(hand deliver)

Peggy Elting, Hearing Examiner  
Department of Natural Resources  
and Conservation  
32 South Ewing  
Helena, MT 59620  
(hand deliver)

  
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Department of Natural Resources  
and Conservation  
32 South Ewing  
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